Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

EQUALS INTERNATIONAL, LTD., *Petitioner*,

v.

SCENIC AIRLINES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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47 pp $ 10

QUESTIONS PRESENTED

I. Whether Rule 54 (d)(2)(B) of the Federal Rules of Civil Procedure precludes the award of attorney fees and costs pursuant to a motion for attorney fees and costs filed in excess of 16 months subsequent to entry of a judgment.

II. Whether the Constitutional right to a trial is violated by dismissal of an action based upon a single failure to produce a witness for deposition to confirm a party's status as a corporation.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Equals International, Ltd. is a Cayman Islands corporation. There is no parent or publicly held company that owns more than ten percent (10%) of the corporation stock. Equals International, Ltd. was the Plaintiff and Counter Defendant in the District Court and the Appellant in the Ninth Circuit Court of Appeals.

Respondent

Scenic Airlines was a Utah corporation and is believed to be owned by Skywest, Inc., a Utah Corporation. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of said corporation's stock. Respondent was the Defendant and Counter Plaintiff in the District Court, and the Appellee before the Ninth Circuit Court of Appeals.

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TABLE OF CITED AUTHORITIES

Cases:

Conley v. Gibson,
355 U.S. 41, 48, 78 S.Ct. 99,
2 L.Ed.2d 80 (1957) 4

Foman v.Davis,
371 U.S. 178, 83 S.Ct. 227,
9 L.Ed. 272 (1962) 4

Statutes:

17 U.S.C. § 101 et. seq. 1, 2
28 U.S.C. § 1338 (a) 1, 2
Federal Rule of Civil Procedure 54 (d)(2)(B) 1, 3

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit Court opinion is contained in Appendix C at page 5a.

The District Court judgments are contained in Appendices D and E, at pages 11a and 13a, respectively.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on May 16, 2002.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

17 U.S.C. § 101 et. seq.
28 U.S.C. § 1338 (a)
Federal Rule of Civil Procedure 54

STATEMENT OF THE CASE

Equals International, Ltd., brought this action against Scenic Airlines for breach of contract due to Scenic's failure to pay for the use of an airline management system provided by Equals software. Payment was to be made for each

passenger boarded by Scenic to Equals while the system was in use. Scenic continued to use the system, but stopped paying for use of the system. Thereafter, Scenic copied the software and created a derivative program from Equals software. The complaint against Scenic contained a claim for copyright infringement. The original action was based, in part, upon a claim arising under the Federal Copyright Act, as awarded, 17 U.S.C. § 101 *et. seq.* providing jurisdiction pursuant to 1338 (a) of the Judicial Code 28 U.S.C. § 1338 (a).

After several years of litigation the District Court dismissed Equals' claims finding a failure to prosecute the case by the real party in interest. A motion to amend the complaint to substitute the real party in interest was denied by the District Court. The District Court also grounded its dismissal upon alleged discovery violations and further finding Equals lacked the capacity to sue under Nevada Law. The Ninth Circuit Court of Appeals affirmed the dismissal solely upon the alleged discovery violations. The sole discovery violation was the failure of Equals to produce a Rule 30 (b) (6) witness for deposition to confirm the status of Equals as a corporation.

The case proceeded to trial solely on Scenic's counterclaims and a third party action. After dismissal of several counterclaims prior to trial and adverse jury verdicts, Scenic received a judgment in an amount slightly in excess of $20,000. This precluded an award of attorney fees pursuant to Nevada law.

The District Court assessed attorney fees and costs against Equals in the amount of $557,298.95, based upon the dismissal of the original action, finding the original action was brought without reasonable grounds. Equals was never given

an opportunity to argue the merits of their claims. Equals' claims were dismissed and fees and costs awarded against them without a determination of the merits of Equals' claims. It should be noted that the District Court Judge who ruled that Equals' claims were groundless, was the third judge assigned to the case and only heard the issues surrounding the counterclaims and not Equals' claims, which were dismissed by a different judge.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Ninth Circuit Court is Incorrect.

Federal Rule of Civil Procedure 54 (d)(2)(B) provides that a motion for attorney fees must be filed within 14 days after entry of judgment. On June 8, 1999 the District Court entered the judgment dismissing Equals' claims against Scenic. Scenic filed its motion for attorney fees and costs subsequent to a judgment entered on October 2, 2000 on Scenic's counterclaim. The award of attorney fees and costs was entered pursuant to a motion for attorney fees and costs filed in excess of sixteen (16) months subsequent to the entry of the judgment of dismissal. Scenic's motion for attorney fees and costs was based on a misinterpretation of Nevada law. Despite a finding by the District Court that Scenic was not entitled to attorney fees and costs based on the Nevada statute cited by Scenic, the District Court awarded attorney fees and costs based upon the entry of the June 8, 1999 judgment dismissing Equals' claims. The motion for attorney fees and costs was not filed within the time limitations imposed by Rule 54.

The Ninth Circuit Court of Appeals found that the District Court vacated the June 8, 1999 judgment and thus

Scenic's motion for attorney fees and costs was timely. This finding is not supported by the record and is clearly in error. The judgment dated June 8, 1999 dismissing Equals' claims was never vacated. As such, the Ninth Circuit was incorrect when it affirmed Scenic's award of attorney fees and costs and declared Scenic's motion for attorney fees and costs as timely filed.

II. The Decision of the Ninth Circuit Court of Appeals Conflicts with Relevant Decisions of the United States Supreme Court and Violates Equals' Constitutional Right to a Trial.

Equals has a constitutional right to a trial. That right was violated when Equals' claims were dismissed based upon a single failure to produce a witness for deposition. The Ninth Circuit Court of Appeals has decided an important federal question in a way which conflicts with relevant decisions of this Court.

The United States Supreme Court has clearly stated its position that cases should be resolved on their merits and not upon mere technicalities. *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L.Ed 272 (1962). In *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed 80 (1957) this court restated this position indicating that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

The Ninth Circuit affirmed the dismissal of Equals' complaint based upon Equals' failure to produce information

regarding its corporate status. The record reflected that Equals' only non-compliance with a court order was its inability to produce, in Nevada, a corporate representative from the Cayman Islands to confirm the status of the corporation. The status of the corporation did not involve the merits of the case. Clearly, this is not the type of discovery violation which should deprive a party of his constitutional right to a trial.

To add insult to injury; the District Court, which precluded Equals from presenting any evidence to support their claims against Scenic, found that the complaint was brought "without reasonable grounds" and awarded attorney fees and costs against Equals, despite state law to the contrary. Equals should not have been denied its constitutional right to a trial under these circumstances.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

[Filed June 13, 2002]

No. CV-S-96-1188-KJD (PAL)
C/A 01-16058

EQUALS INTERNATIONAL)
Plaintiff/Appellee)
)
vs.)
)
SCENIC AIRLINES)
Defendant/Appellant)
)

ORDER ON MANDATE

The above-entitled cause having been before the United States Court of Appeals for the Ninth Circuit, and the Court of Appeals for the Ninth Circuit having on June 10, 2002 issued its mandate affirming the District Court Judgment, and the Court being fully advised in the premises, NOW, THEREFORE, IT IS ORDERED that the mandate be spread upon the records of this Court.

Dated this 13th day of June, 2002.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 10, 2002]

No. 01-16085
CT/AG#: CV-96-01188-KJD/PAL

EQUALS INTERNATIONAL, LTD.	)
Plaintiff-counter-defendant-Appellant	)
v.	)
SCENIC AIRLINES	)
Defendant-counter-claim 3rd-party plaintiff-Appellee	)
v.	)
JIM BUTLER	)
Third-party-defendant-Appellant	)

JUDGMENT

APPEAL FROM the United States District Court for the District of Nevada (Las Vegas).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Las Vegas) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 16, 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 16, 2002]

No. 01-16085

EQUALS INTERNATIONAL LTD.
Plaintiff-counter-defendant-Appellant

v.

SCENIC AIRLINES
Defendant-counter-claim 3rd-party plaintiff-Appellee

v.

JIM BUTLER
Third-party-defendant-Appellant

Appeal from the United States District Court
for the District of Nevada
D.C. No. CV-96-01188-KJD/PAL
Kent J. Dawson, District Judge, Presiding

Argued and Submitted April 11, 2002
Palo Alto, California*

JUDGES:
Before O'SCANNLAIN and TALLMAN, Circuit Judges, and KING,** District Judge.

MEMORANDUM***

Equals International, Ltd. and Jim Butler appeal the district court's dismissal of Equals's complaint, the award of attorney's fees and costs, and the exclusion of two witnesses during the trial of the counter- and third-party claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

I.

The district court dismissed the complaint on two independent grounds. Because we affirm based upon Fed. R. Civ. P. 37(b)(2)(C), we need not reach the propriety of dismissal based upon Fed. R. Civ. P. 17.

---

* Special session held at Stanford University Law School.

** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] Appellants's Motion for Reconsideration of their Motion to Substitute the Real Party in Interest is denied.

The imposition of discovery sanctions is reviewed for an abuse of discretion. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). Findings of fact underlying the motion for discovery sanctions are reviewed for clear error. Id. The district court's choice of sanctions is reviewed for an abuse of discretion. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002).

"Rule 37 sanctions were intended to punish evasion of pretrial discovery." *Wanderer v. Johnston*, 910 F.2d 652, 655 (9th Cir. 1990) (citation and internal editorial marks omitted). A district court is to apply the following factors in considering dismissal as a sanction:

> "(1) the public's interest in expeditious resolution of litigation;
>
> (2) the court's need to manage its dockets;
>
> (3) the risk of prejudice to [the party seeking sanctions];
>
> (4) the public policy favoring disposition of cases on their merits; and
>
> (5) the availability of less drastic sanctions."

Id. at 656 (citations omitted) (alteration in original).

The district court on several occasions gave direct orders for Equals to produce specific information regarding its capacity to sue and be sued. Equals repeatedly failed (at least three times) to produce the information. Only upon a

motion to dismiss by Scenic did Equals belatedly produce information to the court purportedly satisfying its obligations. The district court found, however, that the basic information regarding Equals's status was never produced. That finding was not clearly erroneous.

Applying *Wanderer*, four of the five factors weigh in Scenic's favor. The public's interest in expeditious litigation would not be served by condoning Equals's tactics in refusing to disclose corporate information. Similarly, the court's need to manage its dockets was impaired by a plaintiff refusing to follow court orders. Scenic would suffer prejudice by continuing to defend against a plaintiff which refused to participate in discovery regarding its corporate status. Finally, less drastic sanctions had been implemented without success. The district court did not abuse its discretion in dismissing the complaint under Rule 37(b)(2)(C).

II.

An award of attorney's fees made pursuant to state law is reviewed for an abuse of discretion. *MRO Communications, Inc. v. Am. Tel. & Tel.*, 197 F.3d 1276, 1279 (9th Cir. 1999). The interpretation of a state statute regarding attorney's fees is reviewed de novo. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

The district court awarded attorney's fees and costs to Scenic under Nev. Rev. Stat. 18.010(2)(a). State law, rather than federal law, properly applies. "Federal courts are required to apply state law in diversity actions with regard to the allowance or disallowance of attorney fees." *Michael-Regan Co. v. Lindell*, 527 F.2d 653, 656 (9th Cir. 1975).

Although Equals originally brought this case as a federal question copyright case, not as a diversity action, the same Erie doctrine principles apply. *See Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995); *see also Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001). Thus, at least as to the state law claims, the state fee statute applies. *See MRO Communications*, 197 F.3d at 1281.

The district court correctly determined that Scenic was a prevailing defendant on Equals's original complaint. The court made such a finding based upon the evidence at trial on Scenic's counter-claim for breach of contract. The court was able to conclude that Equals's complaint could have had no merit given Scenic's success on the counter-claim. The court concluded that the original complaint was brought "without reasonable ground" and "to harass the prevailing party [Scenic]." The fact that the complaint had also been dismissed because Equals refused to disclose corporate information also played a part in the district court's decision. The court also considered Equals's unreasonable refusal to accept Scenic's oral offer to settle (to drop the counter-claims and third-party claims in exchange for Equals's foregoing an appeal of the dismissal of Equals's complaint).

Equals contends that Scenic violated Fed. R. Civ. P. 54(d)(2)(B) because it did not file its motion for attorney's fees within 14 days after entry of judgment. This argument lacks merit. Equals points to the June 8, 1999, judgment (which resulted from the earlier dismissal of Equals's complaint) and argues that Scenic did not file within 14 days of that judgment nor specify that it was seeking fees under that judgment. It is undisputed, however, that the district

court vacated the June 8, 1999, judgment to allow Scenic to prosecute its counter-claims and third-party claims. Scenic's motion for fees was timely filed within 14 days from the October 2, 2000, judgment.

Given the specific findings of the district court, the district court's award of fees under Nev. Rev. Stat. 18.010(2)(b) was not an abuse of discretion.

III.

Finally, Equals challenges the district court's exclusion of proffered witnesses Rainwater and Dixon. Evidentiary rulings are reviewed for an abuse of discretion. *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001). To reverse on the basis of an erroneous evidentiary ruling, we must conclude not only that the district court abused its discretion, but also that the error was prejudicial. Id. Prejudice means that, "more probably than not, the [district] court's error tainted the verdict." *Id.*

The district court had proper grounds to exclude both witnesses. Equals had not properly subpoenaed Rainwater, a witness affiliated with Scenic. In any event, the court found that his testimony would be cumulative and allowed Equals to submit documentation as evidence to preclude undue prejudice. Similarly, Dixon had not been identified as a witness in any pretrial proceedings or statements. Excluding the witnesses was not an abuse of discretion.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

[Filed April 2, 2001]

No. CV-S-96-1188-KJD

EQUALS INTERNATIONAL, LTD.
Plaintiff,

v.

SCENIC AIRLINES
Defendant.

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant Scenic Airlines be awarded attorney fees in the amount of four hundred ninety-nine thousand, eight hundred forty-one

dollars ($499,841.00), together with costs as evidenced by Defendant Scenic Airlines' Bill of Costs in the amount of fifty-seven thousand, four hundred fifty-seven dollars and ninety-five cents ($57,457.95).

April 2, 2001
Date

Lance S. Wilson
Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

[Filed June 8, 1999]

No. CV-S-96-1188-JBR (RLH)

EQUALS INTERNATIONAL, LTD.
Plaintiff,

v.

SCENIC AIRLINES, a Utah Corporation; and Does I through 50 inclusive,
Defendants.

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant/Counterclaimant/Third-Party Plaintiff Scenic Airlines' Motion to Dismiss is GRANTED. Judgment is for Defendant/Counterclaimant/Third-Party Plaintiff Scenic Airlines and against Plaintiff/Counterdefendant Equals International, Ltd.

June 8, 1999
Date

Lance S. Wilson
Clerk

/s/ _____
(By) Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed April 27, 1999]

No. CV-S-96-1188-JBR (RLH)

EQUALS INTERNATIONAL, LTD.
Plaintiff,

v.

SCENIC AIRLINES, a Utah Corporation; and Does I through 50 inclusive,
Defendants.

SCENIC AIRLINES, a Utah Corporation,
Counterclaimant,

v.

EQUALS INTERNATIONAL, LTD.,
Counterdefendant.

SCENIC AIRLINES, a Utah Corporation,
Third-Party Plaintiff,

v.

JIM BUTLER
Third-party-defendant.

ORDER

This matter is before the Court on Plaintiff's Motion for Leave to Amend the Amended Complaint (#178).

BACKGROUND

Prior to this litigation, Scenic and Equals were parties to a contract whereby Equals was to provide computer software to Scenic for use in operating Scenic's airline business. A dispute arose, and Equals filed a complaint against Scenic asserting claims of copyright infringement, breach of contract, breach of implied covenant of good faith and fair dealing and breach of fiduciary duty (#1). In the pleadings to date, Equals has been identified as a limited partnership. Equals now seeks leave to amend its Complaint to reflect its corporate status.

DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure ("F.R.C.P.") provides that "...leave [to amend] shall be freely given when justice so requires..." Fed. R. Civ. P. 15(a).

Equals offers as a basis for its motion to amend that its prior counsel "mistakenly" designated Equals as a limited partnership rather than the Cayman Islands corporation that Equals actually is.

This Court finds it hard to believe that the experienced and competent business litigation firm which previously represented Equals would make such a mistake and leave it uncorrected. Although Equals' motion contains a statement to that effect, there is no affidavit attesting to the "mistake."

Exposure to liability will differ depending on the corporate or partnership status of Equals. *See Durando v. United States*, 70 F.3d 548, 551-52 (9th Cir. 1995). This Court is aware of the parties' pretrial disputes regarding the identity of Equals' owners, directors, officers and partners. This Court awarded attorneys' fees to Scenic based on Equals' failure to follow the Court's Order requiring Equals to provide Scenic with pertinent information of that very nature (#180). This circumstance, coupled with the fact that the discovery period had expired, convinces the Court that justice would not be served by allowing the amendment.

Equals has previously been given leave to amend its Complaint. This case has been pending for nearly three years and needs to proceed to trial without the delay which would inevitably result if the requested amendment were allowed. Accordingly,

IT IS ORDERED that Plaintiff's Motion for Leave to Amend the Amended Complaint (#178) is DENIED.

DATED this 27th day of April, 1999.

/s/ _____
Johnnie B. Rawlinson
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed April 14, 1997]

No. CV-S-96-1188-LDG (RLH)

EQUALS INTERNATIONAL, LTD.	)
Plaintiff,	)
	)
v.	)
	)
SCENIC AIRLINES, a Utah Corporation; and Does 1 through 50 inclusive,	)
Defendants.	)

AMENDED COMPLAINT

COMES NOW Plaintiff, EQUALS INTERNATIONAL, LTD. ("EQUALS") by and through its counsel, the law firm of GORDON & SILVER, LTD., and for its Amended Complaint alleges as follows:

JURISDICTION AND VENUE

1. This action arises under the Federal Copyright Act of 1976, as amended, 17 U.S.C. §§ I01 *et seq*. Accordingly,

this Court has jurisdiction pursuant to §§ 1335(a) of the Judicial Code, 28 U.S.C. §§ 1338(a).

2. This Court has, and should assume pendent jurisdiction of Plaintiffs' non-federal claims pursuant to § 1338(b) of Title 28 of the United States Code.

3. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400(a).

4. Plaintiff is a limited partnership organized pursuant to the laws of the Grand Cayman Islands

5. Plaintiff is informed and believes and based thereon alleges that Defendant, SCENIC AIRLINES, ("SCENIC") is a corporation organized under the laws of the State of Utah, with its primary place of business in Clark County, Nevada.

6. Defendants DOES 1 through 50 are individuals and/or entities who are in existence and are directly, jointly and/or vicariously liable to Plaintiff for the matters set forth herein, The exact names and/or identities of the said Defendants are presently unknown to Plaintiff, who therefore sues said Defendants using fictitious names. At the time Plaintiff discovers the true names and/or identities of said Defendants, Plaintiff will move to amend this Complaint to include their true names and/or identities

7. This Court has personal jurisdiction over Defendant since Defendant transacts significant amounts of business in Nevada, having its principal air tour operation in North Las Vegas, Nevada.

BACKGROUND FACTS

8. On or about October 20, 1994, the predecessor of Plaintiff, COMPUTECH SOFTWARE SERVICES, INC. ("COMPUTECH"), entered into an agreement (the "Agreement") with Defendant to provide an airline management software system titled "Equals Airline Reservations System," (the "SOFTWARE"). A copy of the Agreement is attached hereto as Exhibit "1."

9. Plaintiff has obtained U.S. Copyright Registrations TX 4-236-000 and TX 4-395-711 for the Software, copies of which are attached hereto as Exhibit "2."

10. The Agreement provided that Computech would lease the software systems to Defendant, and in return, Defendant agreed to pay a forty thousand dollar ($40,000.00) down payment plus the sum of twenty five cents ($.25) per revenue passenger boarded ("RPB") on Defendant's flights for a period of five (5) years and then ten cents ($.10) per RPB thereafter.

11. The Agreement specifically provided that Defendant had no rights to the copyrights attached to the Software.

12. The Agreement further provided that Computech could transfer the Agreement to a Grand Cayman Islands-based company to be formed.

13. This transfer was eventually accomplished and the Plaintiff, Equals, was assigned all the rights of Computech.

14. The Agreement further provided that if payment was stopped by Defendant, or if Defendant was delinquent for more than sixty (60) days, Defendant would *immediately* stop using the Software in its entirety.

15. The Agreement wins later amended on February 2, 1995 (the "First Amendment"), to provide for a further advance payment of twenty thousand dollars ($20,000) from Defendant to Computech. A copy of the First Amendment is attached hereto as Exhibit "3."

16. The First Amendment also altered the fee arrangement such that Computech/Equals' RPB payments would be phased in with Defendant's use of the Software.

The Agreement was again amended on May 11, 1995 (the "Second Amendment"; collectively the "Amendments") to add an additional thirty thousand dollar ($30,000.00) advance payment and to further alter the RPB payments. A copy of the Second Amendment is attached hereto as Exhibit "4."

FIRST CLAIM FOR RELIEF

(Breach of Contract)

17. Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1-17, inclusive, and by this reference incorporates the same as though fully set forth herein.

18. Pursuant to the aforementioned Agreement and Amendments, Defendant agreed to pay RPB payments to

Plaintiff. However, despite repeated requests from Plaintiff, the Defendant has failed and refused to pay any RPB payments to Plaintiff following September, 1995, or to provide an accounting.

19. Plaintiff is informed and believes, and thereon alleges that the RPB payments made for June, July and August, 1995 do not represent the true amount owed by Defendant.

20. In direct violation of the provision of the Agreement requiring Defendant to stop using the Software following non-payment for sixty (60) days, Defendant has failed and refused to stop using the Software.

21. As a direct and proximate result of these breaches, Plaintiff has been damaged in an amount to be proven at trial.

That it has been necessary to hire an attorney to prosecute this action and Plaintiffs are entitled to their reasonable attorneys' fees therefore.

SECOND CLAIM FOR RELIEF

(Breach of Implied Covenant of
Good Faith and Fair Dealing)

22. Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1-23, inclusive, and by this reference incorporates the same as though fully set forth herein.

23. In entering into its Agreement and subsequent Amendments with Defendant, Plaintiff reposed trust and confidence in Defendant, among other things, to deal with Plaintiff fairly, specifically, not to wrongfully deprive Plaintiff if its contractual compensation. Defendant knew of and accepted such trust and confidence at the time it entered into the Agreement and Amendments.

24. In addition to the terms of the Agreement and Amendments set forth above, Defendant impliedly covenanted that it would;

(a) deal with Plaintiff fairly and in good faith and would not arbitrarily, capriciously, or without good cause deprive Plaintiff of the benefit of its bargain with Defendant;

(b) use care and diligence in accounting to Plaintiff for all RPBs pursuant to the Agreement and Amendments;

(b) act in good faith in stopping the use of the Software immediately upon ceasing to pay Plaintiff royalties pursuant to the Agreement and the Amendments; and

(c) not otherwise engage in unlawful conduct towards Plaintiff.

25. By the acts alleged above, Defendant has breached its covenants of good faith and fair dealing, and each of the covenants set forth in Paragraph 26 above.

26. As a direct and proximate result of said breaches by Defendant, Plaintiffs have suffered monetary damages, with interest, in an amount to be established at trial.

27. In doing the acts alleged above, Defendant has been guilty of oppression, fraud and malice, and has acted in conscious disregard of Plaintiffs' rights, entitling Plaintiff to recover exemplary damages in an amount to be established at trial.

THIRD CLAIM FOR RELIEF

(Copyright Infringement)

28. Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1-29, inclusive, and by this reference incorporates the same as though fully set forth herein.

29. The Software referred to above constitutes copyrightable subject matter, since it is an original work of authorship by Plaintiff and its principal, Jim Butler, and is fixed in a tangible medium of expression.

30. Plaintiff has obtained U.S. Copyright Registrations Numbers TX 4-236-000 and TX 4-395-711 for the Software.

31. Defendant, having failed and refused to pay the RPB fees, is not authorized to use the Software, and is infringing on Plaintiff's copyright by its continued use of the Software.

32. Defendant, by copying and creating a derivative computer program from the Software, and by using, distributing or publishing the Software and the derivative work, has knowingly and intentionally infringed on Equal's copyright.

33. As a direct and proximate result of the use of the Software, Plaintiff has, and will continue to be irreparable harmed.

34. Plaintiff has spent a considerable amount of time, money and creativity in the Software.

35. Defendant has been unjustly enriched by its copying use, modification and distribution of the Software and works derived from it.

36. Plaintiff is further entitled to recover from Defendant the damages it has sustained and will sustain as a result of Defendant's wrongful acts as herein above alleged.

37. That is has been necessary to hire an attorney to prosecute this action and Plaintiff is entitled to its reasonable attorneys' fees therefore.

FOURTH CLAIM FOR RELIEF

(Injunction)

38. Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1-39, inclusive, and by this reference incorporates the same as though fully set forth herein.

39. Plaintiff is informed and believes and based thereon alleges, that on or about the fourth quarter of 1995, Defendant directed its agents and/or employees to modify the Software without the knowledge or permission of Plaintiff.

40. Plaintiff is informed and believes, and thereon alleges, that at or about the same time, Defendant knowingly, and without the permission of Plaintiff, copied, modified, and distributed, or caused to be copied, modified and distributed, derivative works from the Software.

41. The modifications, copies and distribution of derivative works constitutes continuing infringement of Plaintiff's copyright in the Software.

42. The Software provided to Defendant by Plaintiff is a unique program which is also protected by copyright law.

43. As outlined above, Defendant has breached its license agreement by failing and refusing to pay for the Software.

45. Despite repeated demands from Plaintiff, Defendant has failed and refused to stop using the Software.

48. If Defendant is allowed to continue to use the Software, Plaintiff will suffer irreparable harm, it would lose the benefit of all of the substantial time, effort, and creativity it put into the Software.

49. Similarly, in light of the unique nature of the copyrighted Software, and the parties' agreement that Defendant would stop using it following non-payment for

sixty (60) days, Plaintiff would request an injunction to prevent any further use, modification, distribution and copying of the Software.

48. That is has been necessary to hire an attorney to prosecute this action and Plaintiff is entitled to its reasonable attorneys' fees therefore, and specifically for obtaining an injunction.

FIFTH CLAIM FOR RELIEF

(Breach Of Fiduciary Duty)

49. Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1-50, inclusive, and by this reference incorporate the same as though fully set forth herein.

50. Based upon Defendant's obligations to account to Plaintiff, and the fact that Defendant possessed and controlled, and continues to possess and control, all documents related to boardings of passengers and use of the Software, and all accounting records and information regarding flight operations and passenger boardings and use of the Software, a fiduciary duty in favor of the Plaintiff arose, and continues to exist, apart from any other fiduciary duty owed by Defendant to Plaintiff, obligating Defendant to account fully and accurately to Plaintiff, not to act in its self interest to the detriment of the Plaintiff, and not to deprive Plaintiff of the benefit of its bargain with Defendant.

51. Plaintiff entered into the Agreement and the Amendments based upon Defendant's express and implied

representations that Defendant would honestly report RPBs to Plaintiff, timely pay for such RPB count, and to immediately cease use of the Software upon failing to pay Plaintiff pursuant to the Agreement and Amendments.

52. As a result of Defendant's representations, assurances, and assumption of fiduciary obligations to Plaintiff, Defendant owed a fiduciary duty to Plaintiff to act in the highest good faith; to perform its duties in a competent manner; to make full disclosure of all material facts to Plaintiff; to refrain from acquiring any interest or engaging in conduct adverse to Plaintiff; to account promptly and accurately for all passenger boardings; and to exercise faithful, undivided loyalty with respect to the Plaintiff.

53. In reliance upon Defendant's assurances regarding this special fiduciary relationship, Plaintiff did repose special faith and trust in Defendant and did rely upon Defendant to fully and faithfully carry out its fiduciary obligations.

56. Defendant has breached its fiduciary duty to Plaintiff by, among other things, failing to account to Plaintiff, and failing to cease use of the Software immediately upon failure to pay Plaintiff pursuant to the Agreement and Amendments.

55. As a direct and proximate result of Defendant's conduct in breach of its fiduciary duties, Plaintiff has suffered damages in an amount to be established at trial.

58. In doing the acts alleged above, Defendant has been guilty of oppressions, fraud and malice, and bas acted in conscious disregard of Plaintiffs rights, entitling Plaintiff to

recover exemplary damages in an mount to be established at trial.

SIXTH CLAIM FOR RELIEF

(Imposition Of A Constructive Trust)

59: Plaintiff repeats and realleges each of the allegations set forth in paragraphs 1-58, inclusive, made by this reference incorporate the same as though fully set forth herein.

60. Defendant, as alleged above, is a fiduciary and trustee of Plaintiff and is thus obligated to account to Plaintiff for all RPBs pursuant to the Agreement and Amendments, which Defendant has failed and refused to do.

61. As a direct and proximate result of the foregoing, Plaintiff requests that a constructive trust be imposed upon all funds, assets, revenues and profits of Defendant which are due and owing to Plaintiff and which are derived from the use of the Software or from any work derived therefrom, including, but not limited to, all royalties due and owing pursuant to the Agreement and Amendments.

WHEREFORE, Plaintiff prays for relief as follows:

1. That judgment be entered for Plaintiff against Defendant, for Plaintiff actual damages according to proof, and for any additional profits attributable to infringements of Equals' copyright, in accordance with proof;

2. That Defendant be required to account for all gains, profits, and advantages derived from its acts of infringement and for other violations of the law;

3. That all gains, profits, and advantages derived by Defendant from its acts of infringement and other violations of the law be deemed to be in constructive trust for the benefit of Plaintiff;

4. That Plaintiff be awarded punitive and exemplary damages against Defendant;

5. That Defendant, its directors, officers, agents, servants, employees, and all other persons in active concert or privity or participation with them, be enjoined from using, selling, transferring, publishing, displaying, copying or producing derivatives from any and all software supplied by Plaintiff, its agents or predecessors in interest;

6. That judgment be entered for Plaintiff and against Defendant, for Equals' reasonable costs and attorneys' fees; and

7. For such other and further relief as the Court deems proper under the circumstances.

DATED this 10th day of April, 1997.

GORDON & SILVER, LTD.

BY /s/ _____

JOSEPH S. KISTLER, ESQ.
Nevada Bar No. 003458
DAVID COMAROW, ESQ.
Nevada Bar No. 004571
BRADLEY N. BOODT, ESQ.
Nevada Bar No. 5228
3800 Howard Hughes Parkway, 14th Fl.
Las Vegas, NV 89109

CERTIFICATE OF MAILING

The undersigned an employee of Gordon & Silver, Ltd., hereby certifies that on the 10th day of April, 1997, she served a copy of Plaintiff's Amended Complaint by placing said copy in an envelope, postage prepaid, in the U.S. Mail as Las Vegas, Nevada, said envelope addressed to:

R. Glen Woods, Esq.
Heather M. Kagel, Esq.
Woods & Erickson
2920 N. Green Valley Pkwy., #424
Henderson, Nevada 89014

/s/ _____
Barbara Rosenburg, an
employee of Gordon & Silver, Ltd.

APPENDIX H

LETTER OF UNDERSTANDING

OCTOBER 20, 1994

CompuTech Software Services, Inc. ("COMPUTECH") agrees to provide Scenic Airlines, Inc. ("SCENIC") with the EQUALS airline management system software. Included modules are point-to-point reservations, passenger manifesting, check-in, ticketing, and seat assignment, freight and baggage check-in, travel agency or tour company tracking, frequent flyer history, flight following, capacity and fare basis management, ad hoc custom report writer, SQL interface. Weight & balance, pilot FAA compliance, tour package pricing, ARINC interface (level 2), point-of-sale, inventory control, and aircraft maintenance logs to be completed in the priority schedule specified by SCENIC.

It is the understanding of both parties that the sale of the EQUALS system does not currently address all the requirements of SCENIC. In fact, many requirements have yet to be contemplated. The parties agree that definition, refinement and modification of these requirements will likely occur over a 5 year period. COMPUTECH agrees to provide ongoing modifications to the existing and "to be completed" modules listed above for a period of five years. The term "ongoing modifications" is intended to include programming modifications to the above listed modules as requested by SCENIC to meet SCENIC's current and future needs.

Letter of Understanding - 10/20/94

COMPUTECH agrees to fulfill a maintenance function with regard to the EQUALS system as it exists at the completion of the first five years of this agreement. "Maintenance Function" is defined as any work required to keep the EQUALS software functioning in its "as is" form.

The software is provided on a lease basis with source code installed on site at SCENIC. SCENIC has no rights to the copyright, or distribution of the software to any other parties. SCENIC agrees never to make any claim to the copyright in the future.

SCENIC agrees to pay COMPUTECH the sum of U.S. $40,000.00 (forty thousand dollars) upon signing this leper by both parties as an initial payment for software lease and installation.

SCENIC agrees to pay the sum of U.S. $0.25 (twenty five cents) per revenue passenger boarded ("RPB") each way for the first five years and then $0.10 (ten cents) per RPB thereafter. If payment is stopped or is delinquent for more than 60 days, then SCENIC agrees to immediately stop using the EQUALS system in its entirety.

SCENIC agrees to notify COMPUTECH of its intent to discontinue usage of the EQUALS system at the point an agreement is made with an alternative software system or the decision is made to switch to an alternative system, whichever is first. Payments from SCENIC to COMPUTECH stop at the point where SCENIC stops using the EQUALS system in its entirety.

SCENIC agrees not to disclose the terms of this agreement.

Jim Butler agrees to be on-site at SCENIC, as necessary, up to ten business days per month throughout the implementation phase (approximately six months).

COMPUTECH agrees not to provide software to, any competitor of SCENIC in the "Grand Circle" without the written consent of SCENIC.

COMPUTECH reserves the right to transfer this agreement (and its obligations) to the new Cayman based company currently being formed. Transfer of these rights shall occur without cost to SCENIC.

SCENIC shall become the owner of the EQUALS system in an "as is" condition upon death of Jim Butler or sale of the EQUALS system by Jim Butler or the company described above. SCENIC shall gain no copyright or distribution rights should such an event occur.

/s/ _____
Jim Butler
CompuTech Software Services, Inc.

/s/ _____
Jeff Bassett
Scenic Airlines

10/20/94
Date

APPENDIX I

CERTIFICATE OF REGISTRATION

FOLD-OUT EXHIBIT 1
Pages 37a-39a

*Amended by C.O. Authority of a telephonic conversation on 7/9/96 with David Comarow for Equals International, Ltd.

EXAMINED BY LMS. FORM TX

CHECKED BY

CORRESPONDENCE Yes

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?
☐ Yes ☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box) ▼
☐ This is the first published edition of a work previously registered in unpublished form.
☐ This is the first application submitted by this author as copyright claimant.
☐ This is a changed version of the work, as shown by space 6 on this application.
If your answer is "Yes," give: Previous Registration Number ▼ Year of Registration ▼

DERIVATIVE WORK OR COMPILATION Complete both space 6a & 6b for a derivative work; complete only 6b for a compilation.
a. Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼
Previous version of work.

b. Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼
Additional new nonmusic instruction text

—space deleted—

REPRODUCTION FOR USE OF BLIND OR PHYSICALLY HANDICAPPED INDIVIDUALS A signature on this form at space 10, and a check in one of the boxes here in space 8, constitutes a nonexclusive grant of permission to the Library of Congress to reproduce and distribute solely for the blind and physically handicapped and under the conditions and limitations prescribed by the regulations of the Copyright Office: (1) copies of the work identified in space 1 of this application in Braille (or similar tactile symbols); or (2) phonorecords embodying a fixation of a reading of that work; or (3) both.
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DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.
Name ▼ Account Number ▼

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼
David Comarow, Esq.
Gordon & Silver, Ltd.
3800 Howard Hughes Parkway, #1400
Las Vegas, Nevada 89109 Area Code & Telephone Number ▶ (702) 796-5555

CERTIFICATION* I, the undersigned, hereby certify that I am the
Check one ▶
☐ author
☐ other copyright claimant
☐ owner of exclusive right(s)
☒ authorized agent of Jonas A. Birler
Name of author or other copyright claimant, or owner of exclusive right(s) ▲
of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.
David Comarow Date ▶ 5/24/96
Handwritten signature (X) ▼

MAIL CERTIFICATE TO
Name ▼
David Comarow; Gordon & Silver, Ltd.
Number/Street/Apartment Number ▼
3600 Howard Hughes Parkway, #1400
City/State/ZIP ▼
Las Vegas, Nevada 89109
Certificate will be mailed in window envelope

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

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JAN-15-1997 15:05 KIMBAL PRIOR 001 512 1158 P.22/24

CERTIFICATE OF REGISTRATION

FORM TX

For a Literary Work
UNITED STATES COPYRIGHT OFFICE

This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

TX 4-395-711

EFFECTIVE DATE OF REGISTRATION

Marybeth Peters 2 24 97
Month Day Year

REGISTER OF COPYRIGHTS
United States of America

OFFICIAL SEAL

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

TITLE OF THIS WORK ▼

Equals Airline Reservation System: Scenic Version

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

2 a NAME OF AUTHOR ▼ — DATES OF BIRTH AND DEATH: Year Born ▼ Year Died ▼

Equals International, Ltd., a Cayman Islands corporation

Was this contribution to the work a "work made for hire"? ☒ Yes ☐ No

AUTHOR'S NATIONALITY OR DOMICILE (Name of Country): OR Citizen of ▶ Cayman Islands; Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? ☐ Yes ☒ No; Pseudonymous? ☐ Yes ☒ No. If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

Original computer program instruction text.

NOTE of the law, "author" of work made

b NAME OF AUTHOR ▼ — DATES OF BIRTH AND DEATH: Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

AUTHOR'S NATIONALITY OR DOMICILE (Name of Country): OR Citizen of ▶ ; Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? ☐ Yes ☐ No; Pseudonymous? ☐ Yes ☐ No. If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

NAME OF AUTHOR ▼ — DATES OF BIRTH AND DEATH: Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"? ☐ Yes ☐ No

AUTHOR'S NATIONALITY OR DOMICILE (Name of Country): OR Citizen of ▶ ; Domiciled in ▶

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK: Anonymous? ☐ Yes ☐ No; Pseudonymous? ☐ Yes ☐ No. If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED: 1995 ◀ Year in all cases. This information must be given

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK: Complete this information ONLY if this work has been published. Month ▶ February Day ▶ 1 Year ▶ 1995 ◀ Nation: USA

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼

Equals International, Ltd.
P.O. Box 774307
Steamboat Springs, CO 80477

See instructions before completing this space.

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

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APPLICATION RECEIVED: FEB. 24. 1997

ONE DEPOSIT RECEIVED: FEB 24 1997

TWO DEPOSITS RECEIVED

REMITTANCE NUMBER AND DATE

MORE ON BACK ▶ • Complete all applicable spaces (numbers 5-11) on the reverse side of this page. • See detailed instructions. • Sign the form at line 10.

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☐ CORRESPONDENCE Yes

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'IOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office? **5**

☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box) ▼

This is the first published edition of a work previously registered in unpublished form.

This is the first application submitted by this author as copyright claimant.

This is a changed version of the work, as shown by space 6 on this application.

r answer is "Yes," give: Previous Registration Number ▼ Year of Registration ▼

IVATIVE WORK OR COMPILATION Complete both space 6a and 6b for a derivative work; complete only 6b for a compilation. **6**

xisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

arlier version titled: "Equals Reservation System: Dolphin Express Version"

See instructions before completing this space.

terial Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

Additional program instruction text.

7

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se ▼ Account Number ▼

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David Comarow, Esq.
Gordon & Silver, Ltd.
3800 Howard Hughes Parkway, #1400
Las Vegas, NV 89109

Be sure to give your daytime phone number

Area Code and Telephone Number ▶ (702) 796-5555

10

RTIFICATION* I, the undersigned, hereby certify that I am the

Check only one ▶
- ☐ author
- ☐ other copyright claimant
- ☐ owner of exclusive right(s)
- ☒ authorized agent of Equals International, Ltd

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

the work identified in this application and that the statements made me in this application are correct to the best of my knowledge.

ped or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

David Comarow — date ▶ 2/21/97

Handwritten signature (X) ▼

David Comarow

1

AIL ERTIFI- ATE TO

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Name ▼ David Comarow, Esq.
Gordon & Silver, Ltd.

Number/Street/Apartment Number ▼ 3800 Howard Hughes Parkway, #1400

City/State/ZIP ▼ Las Vegas, NV 89109

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- Complete all necessary spaces
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The Copyright Office may give authority to post laws or statements of policy that do not exist or that have been superseded. To find out whether any particular work is protected, contact the Copyright Office and request a circular.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 408, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

February 1992—120,000

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APPENDIX J

AMENDMENT TO LETTER OF UNDERSTANDING DATED OCTOBER 20, 1994

February 2, 1995

This agreement is an amendment to an original Letter of Understanding dated October 20, 1994.

Scenic Airlines, Inc. ("Scenic') agrees to advance to CompuTech Software Services, Inc. ("Computech") the sum of $20,000 at 8% interest per annum.

Computech agrees to allow Scenic to withhold one half of all amounts earned by Computech under the Letter of Understanding dated October 20, 1994, and the amendments to that letter contained in this document, and to apply those withheld amounts to Computech's outstanding balance with Scenic until paid.

Computech and Scenic agree to the following modifications of the Letter of Understanding dated October 20, 1994.

1) Computech will begin to earn 10 cents per RPB (defined in October 20, Letter of Understanding) at such time as the Maintenance module of the EQUALS software system is being run live by Scenic's Las Vegas and Page maintenance facilities *and*, the EQUALS Reservations/Ticketing/Check in/Dispatch/Flight Following modules are being run parallel

at Scenic's Las Vegas operation. RPBs will be paid only on passengers who's travel originates at the Grand Canyon, Las Vegas or Page.

2) Computech will begin to earn 20 cents per RPB at such time as all of the conditions of #1 are met plus the Equals Reservations/Ticketing/Checkin/Dispatch/Flight Following modules are being run live in Las Vegas. RPBs will be paid only on passengers who are booked into the EQUALS system (Eg. If Southern Arizona is still using Shares exclusively their RPBs would not count):

3) Computech will begin to earn 25 cents per RPB, at such time as all of the conditions of #2 are met plus the Pilot Compliance Reports, Point of Sale and Contact Management modules of the program are completed and being run live by Scenic. RPBs will be paid on passengers as defined in #2.

4) Computech will earn 5 cents per RPB if prior to meeting the conditions described in #1, Scenic uses a portion of the EQUALS system to perform the ticketing and check in functions live at Scenic's Las Vegas Operation. RPBs will be paid only on passengers ticketed on the EQUALS system. This is in addition to the 10 cents earned if the conditions of #1 are met but is dropped once the conditions of #2 are met.

5) Computech's Jim Butler agrees to remain on site at Scenic's Las Vegas or Page operation Monday through Friday for a minimum of 8 hours per day until Computech has met all of the conditions set forth in #3 above. Mr. Butler will be allowed 1 personal day per 2 week period beginning February 5, 1995.

The meeting of each of the thresholds detailed above must be agreed upon by both Computech and Scenic.

/s/ _____
Jim Butler
CompuTech Software Services, Inc.

/s/ _____
Jeff Bassett
Scenic Airlines

2/2/95
Date

APPENDIX K

SECOND AMENDMENT TO LETTER OF UNDERSTANDING DATED OCTOBER 20, 1994

May 11, 1995

This agreement is an amendment to an original Letter of Understanding dated October 20, 1994 and the Amendment to the letter of Understanding dated February 2, 1995.

Scenic Airlines, Inc. ("Scenic") agrees to advance to CompuTech Software Services, Inc. ("CompuTech") the sum of $30,000 at 8% interest, per annum. This brings the total amount advanced CompuTech to $50,000.

As in the February 2, 1995 amendment, CompuTech agrees to allow Scenic to withhold one half of all amounts earned by CompuTech under the Letter of Understanding dated October 20, 1994, and the amendments to that letter contained in this document and the February 2,1995 amendment, and to apply those withheld amounts to CompuTech's outstanding balance with Scenic until paid. Amounts withheld will be applied to any accrued interest until paid, then against the principle.

CompuTech and Scenic agree to the following modifications of the Letter of Understanding dated October 20, 1994 and the Amendment dated February 2, 1995. Items numbered 1 through 4 on the Amendment dated February 2, 1995 are replaced by items 1 through 3 shown below.

Second Amendment to Letter of Understanding - 10/20/94

1) CompuTech will earn 5 cents per Las Vegas and Grand Canyon RPB (RPB is defined in October 20, Letter of Understanding) at such time as the Maintenance module of the EQUALS software system is being run live by Scenic's Las Vegas maintenance facilities. CompuTech will earn 5 cents per RPB for all Page related RPBs at such time as the Maintenance module of EQUALS is being run live at Scenic's Page maintenance facilities. CompuTech will earn 5 cents per RPB for all Southern Arizona RPBs at such time as the Maintenance module of EQUALS is being run live at Scenic's Phoenix maintenance facility.

2) CompuTech will begin to earn 15 cents per RPB at such time as the Equals Reservations/Ticketing/C heck In/Dispatch/Flight Fallowing modules are being run live at .any station. RPBs will be paid only on passengers who are booked into (he EQUALS system (E.g. If Page or Southern Arizona are using Shares or TAS for any RPBs, those non EQUALS RPBs would not count. Any RPBs that have been booked into EQUALS are considered valid RPBs).

3) CompuTech will begin to earn 5 cents per RPB at such time as Pilot Compliance Reports, Point of Sale and Contact Management modules of the program are completed and being run live by Scenic. RPBs will be paid on passengers as defined in #2.

The meeting of each of the thresholds detailed above must be agreed upon by both CompuTech and Scenic.

Second Amendment to Letter of Understanding - 10/20/94

Additionally, the two parties acknowledge that the following areas related to the entire Scenic/EQUALS project are in need of greater definition and that other unforeseen issues may require further definition as the project progresses.

A) Ongoing enhancements for the a period of 5 years from implementation.

B) Scenic's options and rights to the program(s) in the event of abandonment by CompuTech.

C) Issues related to training of Scenic's staff in the use of EQUALS by' CompuTech or its representatives.

The parties further acknowledge that each of them has demonstrated goodwill beyond that which could be required under any or all of the prior signed agreements between them and they will negotiate, in good faith, a resolution to the above listed ambiguities and any and all additional ambiguities that may arise in the future.

Jim Butler Date
CompuTech Software
Services, Inc.

Cliff Langness, President Date
Scenic Airlines

Jeffrey Bassett, Date
Vice President of Finance
Scenic Airlines

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED

AUG 30 2002

CLERK

No. 02-0229

In The
Supreme Court of the United States

EQUALS INTERNATIONAL, LTD.,

Petitioner,

v.

SCENIC AIRLINES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WOODS ERICKSON WHITAKER & MILES LLP
BRIAN C. WHITAKER, ESQ.
Counsel of Record
GREGORY A. MILES, ESQ.
1349 Galleria Drive, Suite 200
Henderson, Nevada 89014
(702) 433-9696

Attorneys for Respondent, Scenic Airlines

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

48 pp

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Equals International, Ltd. is represented by Petitioner to be a Cayman Islands corporation, although its true identity was at issue in the case below. On information and belief, there is no parent or publicly held company that owns more than ten percent (10%) of the corporation stock. Equals International, Ltd. was the Plaintiff and Counter Defendant in the District Court and the Appellant in the Ninth Circuit Court of Appeals.

Respondent

At all times relevant hereto, Scenic Airlines was a Utah corporation wholly owned by Skywest, Inc., a Utah corporation. Skywest is a publicly held company. Respondent was the Defendant and Counterclaimant in the District Court, and the Appellee before the Ninth Circuit Court of Appeals.

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STATEMENT OF THE CASE

I. The Underlying Facts

In filing its Petition for Writ of Certiorari, Equals fails to correctly cite those pertinent facts upon which the U.S. District Court based its rulings, and upon which the Ninth Circuit Court of Appeals sustained the rulings of the District Court. Therefore, a brief review of the underlying facts is in order.

During the time period at issue, Scenic Airlines ("Scenic") was a charter flight operator to the Grand Canyon and various other destinations. In 1994, Scenic began a search for a suitable information management system aimed at integrating the various aspects of its business into a single computer program. Scenic's search culminated in a contract with CompuTech Software Services, Inc. ("CompuTech"), the alleged predecessor in interest of Petitioner Equals International ("Equals"). In a Letter of Understanding (the "Contract"), CompuTech agreed to design, prepare and install an integrated airline management system for Scenic. CompuTech subsequently assigned its rights and obligations under the Contract to Equals International.

Scenic paid Equals the full Contract price for the development and installation of the software, and even went so far as to make large advances on royalties for Scenic's anticipated use of the software after it became functional. However, the software promised by Equals was never fully developed or installed, and the installed modules did not perform as promised. Equals' representative, Jim Butler, ultimately abandoned the project altogether, leaving Scenic in a serious predicament. Ironically, it was Equals who sued Scenic for alleged copyright

violations after Scenic retained a software expert to fix those modules that had been installed and to otherwise cause the software to function as originally promised by Equals. Scenic counter-claimed against Equals and filed a third-party claim against Butler for breach of contract and for recovery of costs and expenses necessitated by Equals' and Butler's abandonment of the project.

II. The Procedural History of the Case

The procedural history of this case is well-documented in the Report and Recommendations filed on May 17, 1999 by then U.S. Magistrate Judge (now U.S. District Court Judge) Roger L. Hunt (Appendix A). The following recitation of the case history closely follows the Magistrate's Report and Recommendations.

Equals filed its Complaint on December 23, 1996 identifying itself as a "limited partnership" organized pursuant to the laws of the Grand Cayman Islands. Equals filed an Amended Complaint on April 10, 1997 again identifying itself as a "limited partnership" organized pursuant to the laws of the Grand Cayman Islands. In the first deposition of Jim Butler on September 28, 1998, he identified himself as the "U.S. representative" or a "chief operating officer" of Equals who ran the company, but testified that he did not have authority to direct or resolve the pending litigation on behalf of Equals. Butler testified that Equals was a partnership that had evolved over time. However, this was contradicted by the purported transfer of a copyright dated December 21, 1994, which designated Equals as a corporation. It was also contradicted by subsequent deposition testimony of Butler on March 17, 1999, wherein Butler appeared as the

"person most knowledgeable" pursuant to Fed. R. Civ. P. 30(b)(6). In that deposition, Butler admitted under oath that Equals had never been a partnership.

Butler admitted in deposition that he had met at least one of the directors of the Equals "corporation." However, he flatly refused to provide the director's name, simply referring Scenic to a "Mr. Alberga," represented to be counsel for Equals in the Grand Cayman Islands. Butler denied knowing how many directors there were, and claimed not to know the identities of the owners or "investors" of Equals. The District Court subsequently found that this contradicted a letter authored by Butler to Scenic dated October 18, 1995 in which Butler claimed to have spoken with Equals' investors and that they had rejected Scenic's proposed resolution of the parties' dispute.

Faced with conflicting testimony, Scenic sought additional information about Equals' true identity, as well as the identity of those who actually exercised control over Equals' decision-making process. The District Court agreed that this was an appropriate line of inquiry under the circumstances. When the information was refused, the District Court intervened. On February 19, 1999, the District Court entered an Order that stated, in pertinent part:

> James A. Butler has succeeded in creating questions and suspicions about Plaintiff's existence which requires this Court's intervention to preserve the integrity of the judicial process.
>
> * * *
>
> Furthermore, Mr. Butler has testified that EQUALS is a corporation, and also testified that it was a partnership, and that it had been

through many changes in its organization. Butler claims that he is the "U.S. Representative" of EQUALS and functions as its "chief operating officer" with capacity to "run the company." Yet, he claims not to know who the "investors" or owners are, of the company, or even their number. He refused to identify the name of the only person he admits knowing in that regard, and claims that he has no authority to negotiate a settlement of the case, nor does he know who handles the finances of the entity. EQUALS is not qualified to do business in the State of Nevada.

Yet, Mr. Butler and Plaintiff's attorneys refuse to permit him to testify regarding the officers, directors or owners, basing their position on the mere assertion, without documenting authority or citation, that they are protected from doing so "due to the confidentiality laws of the Cayman Islands."

Like the Defendant, this Court lacks confidence that EQUALS exists beyond Mr. Butler's imagination, or that it has standing to pursue this action under the laws of the State of Nevada. Cf., N.R.S. § 80.210. Neither Mr. Butler, nor Plaintiff, may hide behind some claimed, foreign law which remains unidentified, unverified, without authority to suggest that this Court is bound by its provisions.

(Appendix A) The District Court further ordered:

> Plaintiff shall, through the deposition of Jim Butler or, if he is unable to answer the questions, through a witness properly responsive to Rule 30(b)(6), which deposition shall be held in Las Vegas, Nevada, provide Defendants with the names and addresses of all officers, directors,

> and owners of Plaintiff EQUALS International, Ltd., together with the documentary evidence of its existence, its place of business, and its incorporation or partnership documents. **At the option of Defendant**, Plaintiff may provide all this information through documents and notarized statements, or in response to interrogatories and requests for production.

(Appendix A (emphasis in original)).

On March 17, 1999, at the time set for the Rule 30(b)(6) deposition ordered above, Mr. Butler appeared, making the unsupported claim that he had recently become the 100% owner of the corporation and there were no other officers or directors of the corporation. In defiance of the District Court's Order, he refused to answer any further questions about the ownership, officers and directors of Equals, and failed to provide any incorporation or partnership documents. Upon being advised during the deposition of the foregoing, the District Court ordered an emergency hearing at 2:05 p.m. that afternoon. The court found that Equals and Butler had not complied with the court's Order of February 19, 1999. Equal's counsel argued that Equals had complied with the Order, or alternatively, had misunderstood what was required. Based upon this representation, the Order was clarified and its directive described as follows:

> IT IS HEREBY ORDERED the Plaintiffs shall produce a person pursuant to Rule 30(b)(6) who can provide the information ordered: the names and addresses of the officers, directors and owners, together with documentary evidence of Equals' existence, place of business, and its incorporation or partnership documents that existed at the time this law suit commenced and

> during the course of this lawsuit, including any changes thereof.

(Appendix A). The Court further ordered that a telephonic hearing would occur on March 22, 1999 at 1:30 p.m. for Equals to provide the Court: (1) the name of the person who would appear as ordered, and (2) a date when that appearance would occur.

On March 22, 1999, the telephonic hearing occurred. At that time, Equals' counsel informed the District Court that the person who could provide the necessary information, a Mr. Michael Alberga represented to be Equals' Cayman Islands attorney, was "too busy" to make himself available at any time in the foreseeable future to have his deposition taken. Equals promised that documents were being sent that would provide some of the required information, although Scenic had not given its approval for, or acceptance of, receiving the information in that form. At that time, the District Court invited Scenic to file an appropriate Motion in light of Equals' conduct.

Scenic filed a Motion to Dismiss Equals' Claims on March 26, 1999. The documents that Equals promised in the March 22, 1999 telephonic hearing were received by the District Court nearly seven weeks after they had been promised, and after all the moving papers relating to Scenic's Motion to Dismiss had been filed for the Court's consideration. The Court found the documents to be completely inadequate. The documents contained copies of purported resolutions, stock certificates, stock register and a transfer of shares. However, there were no articles of incorporation and no certificate of incorporation reflecting any official documentation of corporate existence. There was no list of officers or directors. The documents included

an unsworn cover letter from a Mr. Alberga, but there was no evidence of his authority or knowledge to make representations concerning Equals. Further, the representations Mr. Alberga did make were in direct contradiction of Butler's prior testimony regarding the existence of the entity, its nature, when it was organized, and whether stock was issued.

For a number of reasons, the Court found that the documents appeared to be manufactured, and that Equals had failed to provide the required documentation regarding the existence, ownership, officers or directors of Equals or any corporation of the same name. The Court further found that Butler's belated declaration that he was now the 100% owner of a corporation was, in and of itself, insufficient to remedy Equals' failures.

Ruling on Scenic's Motion to Dismiss, Magistrate Hunt recommended on May 17, 1999 that Equals' claims against Scenic be dismissed. In so doing, the Magistrate commented, "If any case begs for the sanction of dismissal, because of the willful and bad faith conduct of a party, this is the one" (Appendix A). On June 7, 1999, following a de novo review of the record pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and Local Rule IB 3-2, District Court Judge (now Ninth Circuit Judge) Johnnie B. Rawlinson concurred with Magistrate Hunt's recommendation and dismissed Equals' claims against Scenic. A Judgment was entered shortly thereafter, dismissing all claims. That Judgment was vacated by Order dated October 19, 1999, because the Judgment improperly dismissed all claims in the case, including Scenic's counterclaims and third-party claims (Appendix B).

III. The Trial

The jury trial on Scenic's counterclaims against Equals and third-party claims against Butler went forward in September of 2000. At the conclusion of trial, the jury entered verdicts in favor of Scenic Airlines on its Counterclaim against Equals International, Ltd. (in the amount of $19,200.00) and on its Third-party Complaint against Jim Butler (in the amount of $4,375.00). Judgments on Jury Verdict were entered on October 2, 2000 (Appendix C; Appendix D).

IV. The Award of Attorney's Fees and Costs

On October 12, 2000, 10 days following the entry of final judgment, Scenic filed a Motion for Attorney's Fees following trial. Scenic also timely filed a verified Memorandum of Costs. On March 30, 2001, after considering the written submissions of counsel, the District Court awarded attorney's fees to Scenic in the amount of $499,841.00 on the basis that Equals' claims against Scenic had been brought without reasonable grounds and to harass Scenic. The Court further awarded taxable costs to Scenic in the amount of $57,457.95 (Appendix E).

V. The Ninth Circuit's Review of the District Court's Rulings

This matter was appealed to the Ninth Circuit Court of Appeals. Oral argument was heard on April 11, 2002. On May 16, 2002, the three-judge panel unanimously upheld each of the District Court's rulings appealed from (Appendix F).

REASONS NOT TO GRANT CERTIORARI

I. Equals' Petition Misstates the Law at Issue

Equals fails to set forth a meritorious argument for this Court to grant certiorari. Several misstatements are found in Equals' Petition, two of which are found under the heading "Constitutional and Statutory Provisions Involved." The two statutes cited, 17 U.S.C. § 101, et seq. and 28 U.S.C. § 1338(a), each pertain to the enforcement of copyrights. While Equals' underlying action did assert copyright violations (albeit without foundation), Equals' appeal requires no review or application of copyright law. Rather, the appeal focuses on the District Court's dismissal of Equals' claims (1) for Equals' failure to prosecute the case in the name of the real party in interest, and (2) for its grievous discovery violations. Further, the appeal challenges the District Court's award of fees to Scenic. To suggest that this appeal involves copyright law is a blatant misrepresentation that is obviously intended to garner consideration for review.

II. The Ninth Circuit Correctly Affirmed the District Court's Dismissal of Equals' Claims

Contrary to Equals' Petition, the Ninth Circuit Court of Appeals correctly upheld the District Court's rulings. The basis for the rulings, which Equals fails to address in its Petition, was well-grounded both in fact and in law. The first ruling affirmed by the Ninth Circuit was the District Court's dismissal of Equals' claims. As set out above, the District Court had two independent grounds for dismissing Equals' claims, only one of which was addressed and affirmed by the Ninth Circuit – Equals' repeated and intentional disregard of the District Court's

orders compelling Equals to cooperate in discovery. These failures were well-documented in the Magistrate's Report and Recommendations, which served as the basis for the dismissal. Tellingly, at the conclusion of his Report, the Magistrate commented, "If any case begs for the sanction of dismissal, because of the willful and bad faith conduct of a party, this is the one" (Appendix 1).

On appeal, the Ninth Circuit correctly applied the "abuse of discretion" standard of review. The panel addressed each of the five required elements for the sanction of dismissal found in *Wanderer v. Johnston*, 910 F.2d 652, 655 (9th Cir. 1990), and correctly found that four of the five elements weighed in Scenic's favor. According to the Ninth Circuit, the sole element weighing in favor of Equals was the public policy favoring the disposition of cases on their merits. Given the evidence, the Ninth Circuit concluded that the District Court did not abuse its discretion in dismissing the Complaint under Fed. R. Civ. P. 37(b)(2)(C).

In its Petition, Equals fails to show how the Ninth Circuit erred in affirming the District Court's dismissal. Citing only to the one element (out of five) weighing in its favor (the public policy that favors disposing of cases on their merit), Equals turns a blind eye toward its egregious behavior that led to the dismissal of its claims. This Court need only look to the Report and Recommendations of the Magistrate Judge to realize that dismissal of Equals' claims was the only proper sanction under the circumstances, and by no means was an abuse of discretion.

Moreover, contrary to Equals' unsupported argument, a right to trial is not absolute. A party can lose its right to trial by obstructive behavior such as that committed by

Equals in this instance. Otherwise, dismissal of an action would not be an available sanction under Fed. R. Civ. P. 37(b)(2)(C). *See, Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S. Ct. 2123, 2133 (1991) (outright dismissal of a lawsuit, although a particularly severe sanction, yet is within the court's discretion), *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S. Ct. 2455 (1980).

In short, Equals' Petition cites no credible basis for this Court's review of the Ninth Circuit's decision affirming the dismissal of its action. The District Court exercised calculated discretion in dismissing the claims when Equals repeatedly and intentionally failed to abide by court orders requiring Equals to cooperate in discovery. The Ninth Circuit did not err in affirming that ruling.

III. The Ninth Circuit Correctly Affirmed the District Court's Award of Fees

The Ninth Circuit's review of the District Court's award of attorney's fees was similarly based upon an abuse of discretion standard (Appendix 5). After affirming that state law, rather than federal law, applied to attorney fee awards, the Ninth Circuit concluded that the District Court properly exercised its discretion in awarding fees under Nevada Revised Statutes 18.010(2)(b). In rejecting Equals' claim that Scenic failed to timely move for fees under Fed. R. Civ. P. 54(d)(2)(B), the Ninth Circuit agreed with Scenic that final judgment in the case was not entered until October 2, 2000. The record is clear that the June 8, 1999 judgment on which Equals relies in its calculation of time, which mistakenly dismissed all of the pending claims (including Scenic's counterclaims and third-party claims), was vacated by the District Court on

October 19, 1999 to allow Scenic to prosecute its counter-claims and third-party claims. Thus, final judgment was not entered until October 2, 2000, and Scenic's Motion for Attorney's Fees was timely filed 10 days later on October 12, 2000.

Once again, Equals offers no compelling basis for this Court to entertain review of this case. The decision of the Ninth Circuit below was supported and well-reasoned, and the appropriate standard of review was applied.

CONCLUSION

In sum, Petitioner Equals fails to set forth proper basis for this Court to grant certiorari and review the rulings of the Ninth Circuit Court of Appeals. The Ninth Circuit did not err in its review of the case below. It applied the correct standard of review, and it had more than sufficient basis to affirm the District Court's rulings. For all of these reasons, Scenic Airlines prays that this Court deny Equals' Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 30th day of August, 2002,

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APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

EQUALS INTERNATIONAL, LTD., Plaintiff, vs. SCENIC AIRLINES, Defendants.	CV-S-96-1188-JBR (RLH) **REPORT & RECOMMENDATION OF U.S. MAGISTRATE JUDGE** (Filed May 17, 1999) (Motion to Dismiss-#174)

Before this Court, pursuant to 28 U.S.C. § 636(b), is **Defendant Scenic Airlines' Motion to Dismiss** (#174, filed March 26, 1999). Plaintiff Equals International Ltd.'s Response . . . (#182) was filed April 16, 1999. Defendant Scenic Airlines' Reply . . . (#190) was filed April 27, 1999. In addition to the foregoing, the Court has reviewed the exhibits and documents attached to those papers, its previous orders, relevant portions of transcripts of hearings, and the documents attached to the Notice of Filing Documentation in Reference to Status of Equals International Ltd. (#194, filed May 3, 1999).

BACKGROUND

Apparently beginning in October 1994, Scenic Airlines, Inc. ("Scenic") entered into a contract with Computech Software Services, Inc. ("Computech") for

the development, support and lease of software, identified as the "EQUALS airline management system software," to be used in Scenic's business. The agreement was apparently memorialized in a *Letter of Understanding* dated October 20, 1994 and signed by Jim Butler on behalf of Computech. The agreement provided that Computech could transfer the agreement to a Cayman Island company to be formed. A document has been produced, consisting of one sentence, which purports to transfer Computech's copyrights to EQUALS International, Ltd. ("EQUALS") as of December 21, 1994. However, there exist subsequent amendments to the *Letter of Understanding,* dated February 2, 1995 and May 11, 1995, on behalf of Computech, without mention of EQUALS.

Plaintiff EQUALS contends that Scenic stopped paying its obligations under the contract and modified and converted the software to its own use. Scenic contends that after it had paid $90,000 to EQUALS, EQUALS abandoned Scenic, leaving Scenic with nonfunctioning software. Scenic thereafter hired another company to complete the development and support of the software.

Approximately a year later, Plaintiff EQUALS filed the present lawsuit on December 23, 1996. In the complaint, Plaintiff identifies itself as "a limited partnership organized pursuant to the laws of the Grand Cayman Islands." Complaint (#1), paragraph 4.

Plaintiff filed an Amended Complaint (#29) on April 10, 1997, again identifying itself as "a limited partnership organized pursuant to the laws of the Grand Cayman Islands." Amended Complaint (#29), paragraph 4.

Jim Butler has been the only physical presence of either Computech or EQUALS. He is, or was, obviously the president and/or owner of Computech. In his first deposition ("First Depo"), taken September 29, 1998, he was represented as the "U.S. representative" or "a chief operating officer" of EQUALS "who runs the company." First Depo p7, lines 1-12. However, he also testified that he did not have authority to direct or resolve the pending litigation on behalf of EQUALS. First Depo 73: 7-17.

In September 1998 Butler testified that EQUALS had been a partnership and then evolved over time. First Depo 80: 17-22. This is contradicted by the purported transfer of copyright, dated December 21, 1994, which designates it as a corporation. It is also contradicted by Butler's second deposition ("Second Depo") taken March 17, 1999, wherein Mr. Butler was the designated person most knowledgeable, pursuant to Fed. R. Civ. P. 30(b)(6). In that deposition Butler testified that EQUALS had never been a partnership. Second Depo 4:21-5:14. With Mr. Butler's testimony raising questions about who was the real party in interest in the litigation, and who had authority to speak for the Plaintiff, Scenic's counsel attempted to obtain information about the owners, officers, and/or directors of EQUALS, or at least the identity of the person with authority who could speak for the Plaintiff. When Scenic's efforts were rebuffed, they sought intervention by the Court. Unfortunately the court's orders for disclosure were met with the same stonewalling.

Mr. Butler admitted that he had met at least one of the directors of the EQUALS corporation. First Depo 60: 16-20. However, he refused to provide his name, referring counsel to Mr. Alberga, purported counsel for the

corporation in the Grand Cayman Islands. *Id.* 60: 21-25. Furthermore, Butler denied even knowing how many directors there were. *Id.* 60: 1-2. He also claimed not to know the identities of the owners or "investors" of EQUALS. *Id.* 66: 10-15. The foregoing appears to contradict a letter from Mr. Butler to Scenic, dated October 18, 1995, in which he claimed to have spoken with the investors and that they had rejected a proposal Scenic had made. *See* Exhibit E to Scenic's Memorandum in Support of [its] Motion to Compel (#15), filed January 25, 1999).

Faced with conflicting and contradictory testimony, Defendant Scenic sought information about the Plaintiff's real identity, and the identity of those who actually exercised control and the decision-making process, *i.e.*, the owners, officers and directors. An appropriate inquiry under the circumstances. *See Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*, 72 F.R.D. 601 (D.C.Pa. 1976). When the information was refused, Scenic sought the Court's intervention. On February 19, 1999, this Court entered an Order (#162) which reads, in pertinent part, as follows:

> James A. Butler has succeeded in creating questions and suspicions about Plaintiff's existence which requires this Court's intervention to preserve the integrity of the judicial process.
>
> * * *
>
> Furthermore, Mr. [B]utler has testified that EQUALS is a corporation, and also testified that it was a partnership, and that it had been through many changes in its organization. Butler claims that he is the "U.S. Representative"

of EQUALS and functions as its "chief operating officer" with capacity to "run the company." Yet, he claims not to know who the "investors" or owners are, of the company, or even their number. He refused to identify the name of the only person he admits knowing in that regard, and claims that he has no authority to negotiate a settlement of the case, nor does he know who handles the finances of the entity. EQUALS is not qualified to do business in the State of Nevada.

Yet, Ms. Butler and Plaintiff's attorneys refuse to permit him to testify regarding the officers, directors or owners, basing their position on the mere assertion, without documenting authority or citation, that they are protected from doing so "due to the confidentiality laws of the Cayman Islands."

Like the Defendant, this Court lacks confidence that EQUALS exists beyond Mr. Butler's imagination, or that it has standing to pursue this action under the laws of the State of Nevada. Cf., N.R.S. § 80.210. Neither Mr. Butler, nor Plaintiff, may hide behind some claimed, foreign law which remains unidentified, unverified, without authority to suggest that this Court is bound by its provisions.

The Court then "**ORDERED** that . . . Plaintiff shall, through the deposition of Jim Butler or, if he is unable to answer the questions, through a witness properly responsive to Rule 30(b)(6), which deposition shall be held in Las Vegas, Nevada, provide Defendants with the names and addresses of all officers, directors, and owners of Plaintiff EQUALS International, Ltd., together with the documentary evidence of its existence,

its place of business, and its incorporation or partnership documents. **At the option of Defendant**, Plaintiff may provide all this information through documents and notarized statements, or in response to interrogatories and requests for production." (Original emphasis).

On March 17, 1999, at the time set for the Rule 30(b)(6) deposition ordered above, Mr. Butler appeared, making the unsupported claim that he was now the 100% owner of the corporation and there were no other officers or directors of the corporation. In defiance of the above Order, he refused to answer any further questions about the ownership, officers and directors of Equals, and failed to provide any incorporation or partnership documents. Upon being advised, during the deposition, of the foregoing, the Court ordered an emergency hearing which was convened at 2:05 that afternoon. The Court found that Mr. Butler did not comply with its Order of February 19, 1999. Plaintiff's counsel argued that he felt that Plaintiff had complied with the Order and misunderstood what was required.

Based upon Plaintiff's representation that it did not understand the Court's prior Order as described by the Court, the Order was clarified and its directive described as follows:

"**IT IS HEREBY ORDERED** the **Plaintiffs shall produce a person pursuant to Rule 30(b)(6) who can provide the information ordered**: the names and addresses of the officers, directors and owners, together with documentary evidence of Equals' existence, place of business, and its incorporation or partnership documents that existed at the time this law suit commenced and during the course of this lawsuit,

including any changes thereof." Minute Order (#170, filed March 18, 1999).

The Court further ordered that a conference call would occur on March 22, 1999 at 1:30 p.m. for Plaintiff to provide the Court with the name of the person who will appear pursuant to Rule 30(b)(6), as ordered above, and a date when that appearance would occur.

On March 22, 1999, the telephonic hearing occurred. Plaintiff's counsel informed the Court that the person who could provide the ordered information, Michael Alberga, EQUALS' Cayman Islands attorney, was "too busy" to make himself available at any time in the foreseeable future to have his deposition taken. Plaintiff promised that documents were being sent which would provide some information, although Defendant had not given its approval for, or acceptance of, receiving the information in that form (which was at Defendant's discretion).

Documents were received by the Court nearly seven weeks later, and after all the moving papers relating to this motion had been field. *See* Notice of Filing Documentation (#194, filed May 3, 1999). The blatant inadequacy of the documents compels comment.

The documents contain copies of purported resolutions, stock certificates, stock register and a transfer of shares. There are no articles of incorporation, nor is there a certificate of incorporation showing any official documentation of corporate existence. Neither are there lists of officers or directors.

The documents include an unsworn cover letter from Mr. Alberga, without any evidence of his authority

or knowledge to make representations. Furthermore, his representations are in direct contradiction of Butler's testimony regarding the existence of the entity, its nature, when it was organized, and when and whether stock was issued. Frankly, it appears manufactured.

For example, Butler testified that EQUALS (the corporation) had not issued any stock. Second Depo 15:3-4. Also, as noted above, he denied knowing the owners or investors of EQUALS, except for one with whom he had met. However, the purported corporate records suggest that a share of stock was issued to him, and nine shares were issued to an entity identified only as International Corporation Services Ltd. (about which absolutely no information has even been offered), on January 11, 1995.

Furthermore, Mr. Alberga's letter also states that 90% of the shares of EQUALS were owned by this equally elusive and mysterious corporation called "International Corporation Services Ltd., and that Butler owned the other 10%. However, the purported resolutions do not indicate whether they are shareholders' resolutions or directors' resolutions. Neither do they identify in what capacity they are signed by Butler or Alberga.

Equally of note is the fact that although the purported stock certificate and register accurately spell Mr. Butler's name, each and every resolution, from January 1995 to February 1999, misspell his last name in exactly the same way: "Buter."

The resolutions for 1996, 1997 and 1998 are virtually identical, except for the top portion containing the name, EQUALS INTERNATIONAL, and the words,

"RESOLUTIONS OF THE COMPANY PASSED ON THE 31st DAY OF OCTOBER, 1996", etc, which appear to have been pasted onto the rest of the document and which do not always appear to be parallel with the rest of the document. And, they ratify and confirm the actions of "the Director" but do not identify which director is intended, although "All present Directors and Officers" (plural) are noted as reelected (also without identification). Lastly, the documents declare that the Chairman declared the meeting closed. However, neither signatory signed in the capacity of Chairman, nor secretary, and "the Chairman," like "the Director," is not identified.

The foregoing documents totally and utterly fail to provide the required documentation regarding the existence, ownership, officers, or directors of Plaintiff or any corporation of the same name. Mr. Butler's belated declaration that he is now the 100% owner of a corporation which is neither a party to this litigation, nor the existence of which has been verified, is in clear and blatant violation of this Court's orders.

The undersigned notes that Plaintiff moved to amend its complaint once again, to correct its two and one-half year misrepresentation of the nature of its being. *See* Motion for Leave to Amend Complaint (#178, filed March 29, 1999). The undersigned further notes that the motion to amend was denied. Order (#191) filed April 27, 1999.

DISCUSSION

The Defendant's Motion to Dismiss is meritorious on two sufficient and independent grounds: (1) the named

Plaintiff is not the real party in interest (Rule 17(a)) and even if Plaintiff is deemed to be a viable corporation, it does not have the legal capacity to bring this lawsuit; and (2) Plaintiff's refusal to abide by orders of this Court to participate in discovery is so egregious, blatant, deliberate and in bad faith as to justify the sanction of dismissal pursuant to Rule 37.

1. THE CAPACITY OF THE PLAINTIFF

Fed. R. Civ. P. 17(a) clearly requires that, "Every action shall be prosecuted in the name of the real party in interest." Plaintiff clearly and repeatedly represented itself to be a limited partnership and made no efforts to correct that misrepresentation even after the diligent efforts of Defendant's counsel demonstrated that no such entity exists or ever existed. A nonexistent entity cannot be a real party in interest. Neither has there ever been shown that a limited partnership by Plaintiff's name possessed any rights in the claims asserted in this lawsuit.

For more than two years, and through two pleadings, this nonentity pursued a lawsuit while obscuring its real status and eventually attempting to conceal its true nature. "Factual assertions in pleadings . . . , unless amended, are considered judicial admissions conclusively binding on the party who made them." *American Title Ins. Co. V. Lacelaw Corp.* 861 F.2d 224, 226 (9th Cir. 1988). This Court recently rejected the unsworn statement that the designation of Plaintiff as a limited partnership was a mere mistake, and for good and sufficient reason denied Plaintiff's motion to amend. (*See* Order #191).

There is no denial that Plaintiff does not exist and has never existed. "There can be no live controversy without at least two active combatants." *Martinez v. Winner*, 800 F.2d 230, 231 (10th Cir. 1986). Thus, Plaintiff is not and cannot be the true party in interest and cannot, therefore, maintain this lawsuit. Fed. R. Civ. P. 17(a).

Even if this Court were to have permitted the amendment, and permitted Plaintiff to be designated as a corporation, Plaintiff would have lacked the legal capacity to proceed with this litigation. Rule 17(b) provides, in pertinent part, that, "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."

Nevada Revised Statute § 80.210(1) provides that "Every corporation which fails or neglects to comply with the provisions of NRS 80.010 to 80.040, inclusive: (b) . . . [M]ay not commence or maintain any action or proceeding in any court of this state *until* it has fully complied with the provisions of NRS 80.010 to 80.040, inclusive." (Emphasis added). The provisions of NRS §§ 80.010 to 80.040 require the filing of a current certificate of corporate existence, the appointment of a local resident agent, and documents showing the number and type of shares authorized. Not only has the alleged corporation failed to comply with these state statutes, none of the alleged corporate documents, filed with this Court, meet any of the above required disclosures.

As the Ninth Circuit stated, in affirming District Judge Roger D. Foley, "Nevada Revised Statute § 820.210(1) provides that foreign corporation 'shall not be allowed to commence, maintain, or defend any action or proceeding

in any court of the state' until registered to do business in Nevada." *Lake of Las Vegas Investors v. Pacific Malibu Dev.*, 933 F.2d 724, 726 (9th Cir. 1991). Furthermore, a complaint filed by an unregistered corporation is subject to dismissal even if the corporation later complies with § 80.210(1). *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 93 Nev. 270, 275, 563 P.2d 582, 585 (1977).

Accordingly, even if the Court had granted the amendment, Defendant would still have the right to demand dismissal because the so-called EQUALS corporation (assuming it actually exists) still does not have the capacity to pursue this lawsuit. Nor does the law permit it to rectify its incapacity at this stage in the proceedings.

Plaintiff's argument, that it is not required to comply with NRS § 80.210 because "maintaining, defending, or settling any proceeding" does not constitute "doing business" in Nevada under NRS § 80.015, totally misses the mark. Neither Scenic nor this Court is suggesting that EQUALS is doing business *because* it is involved in the lawsuit. Whether it is doing business in Nevada or not, is not the issue. The issue is whether it is qualified to bring a lawsuit here. The provisions of § 80.210 require compliance with the qualifying provisions of §§ 80.010-.040 if a corporation (1) intends to do business here, *or* (2) if it wishes to bring a lawsuit here. It is the latter which is impacted by EQUALS' failure to comply. It is not the doing of business, but the *qualifying* to do business, that is required before bringing a lawsuit. The public policy for requiring the official disclosure of the specified information should be self-evident.

Plaintiff lacks capacity to pursue this lawsuit, whether it is a limited partnership or a corporation, and the motion to dismiss should be granted.

2. SANCTIONS FOR VIOLATION OF COURT ORDERS

In addition to, but independent of, the foregoing is the issue of whether Plaintiff's actions, and those of its counsel and "chief executive officer," justify dismissal of the complaint herein.

Fed. R. Civ. P. 37(b)(2)(C) clearly provides that one of the sanctions available to the Court for a party's failure to obey an order to provide discovery is "dismissing the action." This Court is fully aware that dismissal constitutes an extreme sanction. However, "Where the noncompliance is the result of willfulness or bad faith, the court may impose the sanction of dismissal. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (Decided June 30, 1976); *Societe Internationale v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)." *Costal Plastics v. Morgan, Olmstead, Kennedy, Etc.*, 72 F.R.D. 601 (W.D.Pa. 1976).

The recent history of this matter has been described above. The blatant disregard for direct and specific orders of this Court, together with the cavalier refusal of Plaintiff's Cayman Islands' counsel, who is the only person purported to possess the information ordered, to provide the required information or appear for a deposition, because he was "too busy" and unable to appear in the foreseeable future, is clear and convincing evidence of willfulness and bad faith. This repeated refusal to

provide information, despite repeated orders of the Court, because Plaintiff did not feel it was obligated to do so, constitutes a contemptuous disregard for the Court and a determination to exalt its own opinions over that of this Court in the forum where it seeks relief.

The Ninth Circuit has held as follows:

> Before a district court dismisses a complaint, it must weight the five factors prescribed in *Wanderer v. Johnston,* 910 F.2d 652, 656 (9th Cir. 1990). Then, the district court must find that a party's behavior in ignoring the depositions demonstrated willfulness, bad faith, or fault. *Fjelstad v. American Honda Motor Co.,* 762 F.2d 1334, 1341 (9th Cir. 1985).
>
> *Wanderer* requires the district court to consider: (1) the public's interest in expeditious resolution of litigation, (2) the court's need to manage its dockets, (3) the risk of prejudice to the party seeking sanctions, (4) the public policy favoring disposition of cases on their merits, and (5) the availability of less drastic sanctions. 910 F.2d at 656.

Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994).

Plaintiff argues for a somewhat different criteria which this Court will address momentarily. Let us first consider the *Wanderer* criteria. (1) Dismissal will certainly expedite the resolution of this case. (2) The Court's need to manage its docket is seriously impaired when a recalcitrant litigant repeatedly refuses to abide by its orders and sets its own opinions of its obligations over that of the court's. (3) The Defendant would be seriously prejudiced if required to litigate against a

party who refuses to participate in discovery and defies the orders of the Court, not to mention the prejudice of having to litigate against a phantom Plaintiff. (4) Any attempt to resolve this matter on its merits would be a farce in face of the prospect of Plaintiff's potential rejection of any order or judgment with which it disagreed. (5) Less drastic actions (monetary awards against Plaintiff, orders directing Plaintiff to produce witnesses and/or documentation) have been tried, without success because of the wilful refusal of Plaintiff to abide by repeated orders of the Court.

Hyde & Drath only requires a finding of willfulness, bad faith, ***or*** fault. This Court finds Plaintiff guilty of all three. "Disobedient conduct not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault. *Henry v. Gill Indus.*, 983 F.2d 943, 948 (9th Cir. 1993)." *Hyde & Drath*, 24 F.3d at 1167.

Plaintiff cities criteria pronounced by the Third Circuit for consideration by the Court. In truth, the Third Circuit's criteria are even more damning of Plaintiff. Those factors for consideration are: "1) the extent of the party's 'personal responsibility'; 2) a history of dilatoriness; 3) whether attorney's or other party's conduct was wilful or in bad faith; 4) meritoriousness of the claim (*i.e.*, whether the allegations in the pleadings support recovery); 5) prejudice to the other party; and 6) appropriateness of alternative sanctions." *Ali v. Sims*, 788 F.2d 954, 957 (3d. Cir. 1986); *Poulis v. State Farm Fire and Casualty Co.* 747 F.2d 863 (3d Cir. 1984).

(1) There is no question of Plaintiff's "personal responsibility" for the failure to provide evidence of its

identity or to obey the orders of this Court. (2) The activities described above clearly show that "dilatory" would be a euphemistic characterization of Plaintiff's conduct. (3) The issue of wilfulness or bad faith had been discussed and described above. The involvement, actions and attitude of Plaintiff's counsel also are certainly manifest. (4) There can be no meritorious claim by a phantom Plaintiff, or one which is either a nonentity or lacks capacity to sue. (5) The issue of prejudice to the Defendant is sufficiently described above and in the Court's denial of the motion to amend. (6) The appropriateness (and failure) of alternative sanctions is also clearly described above.

If any case begs for the sanction of dismissal, because of the wilful and bad faith conduct of a party, this is the one.

RECOMMENDATION

Based upon the foregoing, it is the recommendation of the United States Magistrate Judge for the District of Nevada that Defendant Scenic Airlines' Motions to Dismiss (#174) be GRANTED.

Dated: May 14, 1999.

/s/ Roger L. Hunt
ROGER L. HUNT
United States
Magistrate Judge

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EQUALS INTERNATIONAL, LTD., Plaintiff, v. SCENIC AIRLINES, et al., Defendants.	CV-S-96-1188-JBR (RLH) **ORDER** (Filed Oct. 19, 1999)
SCENIC AIRLINES, Counterclaimant, v. EQUALS INTERNATIONAL, LTD., Counterdefendant.	
SCENIC AIRLINES, Third-Party Plaintiff, v. JIM BUTLER, Third-Party Defendant.	

This matter is before the Court on Defendant Scenic Airlines' ("Scenic") Motion to Alter or Amend Judgment (#220). Plaintiff Equals International ("Equals") and Third-Party Defendant Jim Butler ("Butler") filed a Response (#226); and Scenic filed a Reply (#229).

Scenic seeks amendment of the Court's Order (#213), which dismissed this case in its entirety.

Rule 59(e) of the Federal Rules of Civil Procedure (F.R.C.P.) provides:

> Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.[1]

FED. R. CIV. P. 59(e).

A district court may use a Rule 59(e) motion to vacate an entire judgment. *Sanders v. Clemco Indus.*, 862 F.2d 161, 168 n. 13 (8th Cir. 1988). The decision on the Rule 59(e) motion is committed to the sound discretion of the court. *Lawson v. Singletary*, 85 F.3d 502, 507 (11th Cir. 1996) (citation omitted). A motion to amend may be granted to prevent manifest injustice. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

Manifest injustice will occur if Butler is allowed to escape potential liability due to the Court's inadvertent dismissal of Scenic's Third Party Complaint. Accordingly,

IT IS **ORDERED** that Defendant Scenic Airlines' ("Scenic") Motion to Alter or Amend Judgment (#220) is GRANTED.

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[1] Butler and Equals contend that Scenic's motion was not timely. However, their calculation did not exclude Saturdays, Sundays or the date the judgment was entered. See F.R.C.P. 6(a). Scenic's motion was timely.

IT IS FURTHER **ORDERED** that the Court's Order (#213) dismissing the case in its entirety is VACATED.

DATED this 19th day of October 1999.

/s/ Johnnie B. Rawlinson
Johnnie B. Rawlinson
United States District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EQUALS INTERNATIONAL, LTD., Plaintiff, v. SCENIC AIRLINES, a Utah Corporation; and Does 1 through 50 inclusive, Defendants.	Case No: CV-S-96-01188-KJD (—)
SCENIC AIRLINES, a Utah Corporation, Counterclaimant, vs. EQUALS INTERNATIONAL, LTD., Counterdefendant.	**JUDGMENT ON JURY VERDICT** [against Equals] (Filed Oct. 2, 2000)

SCENIC AIRLINES, a Utah Corporation,	)
Third-Party Plaintiff,	)
vs.	)
JIM BUTLER,	)
Third-Party Defendant.	)

Counterclaimant Scenic Airlines' counterclaims against Counterdefendant Equals International Ltd. having come for jury trial on September 11-18, 2000, all parties having been duly represented by counsel at trial, the jury having rendered a verdict in favor of Scenic Airlines and against Equals International in the sum of $19,200.00 on Scenic Airlines' claims for breach of contract and breach of covenant of good faith and fair dealing; all points considered and good cause appearing;

JUDGMENT IS HEREBY ENTERED in favor of Counterclaimant Scenic Airlines and against Counterdefendant Equals International Ltd. in the amount of $19,200.00.

DATED this 2nd day of ~~September~~ October, 2000.

/s/ Kent J. Dawson
United States District
Court Judge

Submitted by:

/s/ Gregory A. Miles
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APPENDIX D

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EQUALS INTERNATIONAL, LTD., Plaintiff, v. SCENIC AIRLINES, a Utah Corporation; and Does 1 through 50 inclusive, Defendants.	Case No: CV-S-96-01188-KJD (—)
SCENIC AIRLINES, a Utah Corporation, Counterclaimant, vs. EQUALS INTERNATIONAL, LTD., Counterdefendant.	**JUDGMENT ON JURY VERDICT** (Filed Oct. 2, 2000)

SCENIC AIRLINES, a Utah Corporation,	)
Third-Party Plaintiff,	)
vs.	)
JIM BUTLER,	)
Third-Party Defendant.	)

Third-party Plaintiff Scenic Airlines' third-party claims against Third-party Defendant Jim Butler having come for jury trial on September 11-18, 2000, all parties having been duly represented by counsel at trial, the jury having rendered a verdict in favor of Scenic Airlines and against Jim Butler in the sum of $4,375.00 on Scenic Airlines' claim for trespass, all points considered and good cause appearing;

JUDGMENT IS HEREBY ENTERED in favor of Third-party Plaintiff Scenic Airlines and against Third-party Defendant Jim Butler in the amount of $4,375.00.

DATED this 2nd day of ~~September~~ October, 2000.

/s/ Kent J. Dawson
United States District
Court Judge

Submitted by:

/s/ Gregory A. Miles
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APPENDIX E

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

JUDGMENT IN A CIVIL CASE

EQUALS INTERNATIONAL. LTD.

Plaintiff,

v. (Filed Apr. 2, 2001)

SCENIC AIRLINES,

Defendant. /

_ **Jury Verdict.** This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X **Decision by Court.** This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant Scenic Airlines be awarded attorney fees in the amount of four hundred ninety-nine thousand, eight hundred forty-one dollars ($499,841.00), together with costs as evidenced by Defendant Scenic Airlines' Bill of Costs in the amount of fifty-seven thousand, four hundred fifty-seven dollars and ninety-five cents ($57,457.95).

April 2, 2001
Date

LANCE S. WILSON
Clerk

/s/ Kathy Yagich
(By) Deputy Clerk

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EQUALS INTERNATIONAL, LTD. Plaintiff-counter-defendant-Appellant, v. SCENIC AIRLINES, Defendant-counter-claimant-3rd-party plaintiff-Appellee, v. JIM BUTLER, Third-party defendant-Appellant	No. 01-16085 D.C. No. CV-96-01188-KJD/PAL MEMORANDUM* (Filed May 16, 2002)

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted April 11, 2002
Palo Alto, California**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** Special session held at Stanford University Law School.

Before: O'SCANNLAIN and TALLMAN, Circuit Judges, and KING,*** District Judge.

Equals International, Ltd. and Jim Butler appeal the district court's dismissal of Equals's complaint, the award of attorney's fees and costs, and the exclusion of two witnesses during the trial of the counter- and third-party claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm. [1]

I.

The district court dismissed the complaint on two independent grounds. Because we affirm based upon Fed. R. Civ. P. 37(b)(2)(C), we need not reach the propriety of dismissal based upon Fed. R. Civ. P. 17.

The imposition of discovery sanctions is reviewed for an abuse of discretion. *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). Findings of fact underlying the motion for discovery sanctions are reviewed for clear error. *Id.* The district court's choice of sanctions is reviewed for an abuse of discretion. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002).

"Rule 37 sanctions were intended to punish evasion of pretrial discovery." *Wanderer v. Johnston*, 910 F.2d 652, 655 (9th Cir. 1990) (citation and internal editorial marks

*** The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

[1] Appellants's Motion for Reconsideration of their Motion to Substitute the Real Party in Interest is denied.

omitted). A district court is to apply the following factors in considering dismissal as a sanction:

> "(1) the public's interest in expeditious resolution of litigation;
>
> (2) the court's need to manage its dockets;
>
> (3) the risk of prejudice to [the party seeking sanctions];
>
> (4) the public policy favoring disposition of cases on their merits; and
>
> (5) the availability of less drastic sanctions."

Id. at 656 (citations omitted) (alteration in original).

The district court on several occasions gave direct orders for Equals to produce specific information regarding its capacity to sue and be sued. Equals repeatedly failed (at least three times) to produce the information. Only upon a motion to dismiss by Scenic did Equals belatedly produce information to the court purportedly satisfying its obligations. The district court found, however, that the basic information regarding Equals's status was never produced. That finding was not clearly erroneous.

Applying *Wanderer,* four of the five factors weigh in Scenic's favor. The public's interest in expeditious litigation would not be served by condoning Equals's tactics in refusing to disclose corporate information. Similarly, the court's need to manage its dockets was impaired by a plaintiff refusing to follow court orders. Scenic would suffer prejudice by continuing to defend against a plaintiff which refused to participate in discovery regarding its corporate status. Finally, less drastic sanctions had been

implemented without success. The district court did not abuse its discretion in dismissing the complaint under Rule 37(b)(2)(C).

II.

An award of attorney's fees made pursuant to state law is reviewed for an abuse of discretion. *MRO Communications, Inc. v. Am. Tel. & Tel.*, 197 F.3d 1276, 1279 (9th Cir. 1999). The interpretation of a state statute regarding attorney's fees is reviewed de novo. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

The district court awarded attorney's fees and costs to Scenic under Nev. Rev. Stat. 18.010(2)(a). State law, rather than federal law, properly applies. "Federal courts are required to apply state law in diversity actions with regard to the allowance or disallowance of attorney fees." *Michael-Regan Co. v. Lindell*, 527 F.2d 653, 656 (9th Cir. 1975). Although Equals originally brought this case as a federal question copyright case, not as a diversity action, the same *Erie* doctrine principles apply. *See Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995); *see also Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001). Thus, at least as to the state law claims, the state fee statute applies. *See MRO Communications*, 197 F.3d at 1281.

The district court correctly determined that Scenic was a prevailing defendant on Equals's original complaint. The court made such a finding based upon the evidence at trial on Scenic's counter-claim for breach of contract. The court was able to conclude that Equals's complaint could

have had no merit given Scenic's success on the counter-claim. The court concluded that the original complaint was brought "without reasonable ground" and "to harass the prevailing party [Scenic]." The fact that the complaint had also been dismissed because Equals refused to disclose corporate information also played a part in the district court's decision. The court also considered Equals's unreasonable refusal to accept Scenic's oral offer to settle (to drop the counter-claims and third-party claims in exchange for Equals's foregoing an appeal of the dismissal of Equals's complaint).

Equals contends that Scenic violated Fed. R. Civ. P. 54(d)(2)(B) because it did not file its motion for attorney's fees within 14 days after entry of judgment. This argument lacks merit. Equals points to the June 8, 1999, judgment (which resulted from the earlier dismissal of Equals's complaint) and argues that Scenic did not file within 14 days of that judgment nor specify that it was seeking fees under that judgment. It is undisputed, however, that the district court *vacated* the June 8, 1999, judgment to allow Scenic to prosecute its counter-claims and third-party claims. Scenic's motion for fees *was* timely filed within 14 days from the October 2, 2000, judgment.

Given the specific findings of the district court, the district court's award of fees under Nev. Rev. Stat. 18.010(2)(b) was not an abuse of discretion.

III.

Finally, Equals challenges the district court's exclusion of proffered witnesses Rainwater and Dixon. Evidentiary rulings are reviewed for an abuse of discretion. *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688

(9th Cir. 2001). To reverse on the basis of an erroneous evidentiary ruling, we must conclude not only that the district court abused its discretion, but also that the error was prejudicial. *Id.* Prejudice means that, "more probably than not, the [district] court's error tainted the verdict." *Id.*

The district court had proper grounds to exclude both witnesses. Equals had not properly subpoenaed Rainwater, a witness affiliated with Scenic. In any event, the court found that his testimony would be cumulative and allowed Equals to submit documentation as evidence to preclude undue prejudice. Similarly, Dixon had not been identified as a witness in any pretrial proceedings or statements. Excluding the witnesses was not an abuse of discretion.

AFFIRMED.